

**STATE OF INDIANA
BEFORE THE INDIANA ALCOHOL AND TOBACCO COMMISSION**

IN THE MATTER OF)	
THE PERMIT OF)	
)	
MAC’S CONVENIENT STORE)	
2080 NORTH SHADELAND AVENUE)	PERMIT NO. DL49-21244
INDIANAPOLIS, INDIANA 46219)	
)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. BACKGROUND OF THE CASE

The Applicant, Mac’s Convenient Stores, LLC., d/b/a Circle K Store #22, 2080 North Shadeland Avenue, Indianapolis, Indiana 46219 (“Applicant” or “Store #22”), permit number DL49-21244, is the applicant for a type 116 Alcohol and Tobacco Commission (“Commission” or “ATC”) permit. The application was assigned to the Marion County Local Alcoholic Beverage Board (“Local Board”). On December 6, 2004, the Local Board heard the application request and voted 4-0 to deny the application. The Commission adopted the Local Board’s recommendation on January 4, 2005.

The Applicant filed a timely Notice of Appeal and the matter was assigned to Commission Hearing Judge U-Jung Choe (“Hearing Judge”). The matter was set for hearing on August 20, 2005, and at that time, witnesses were sworn, evidence was heard, and matters were taken under advisement. The Hearing Judge, having reviewed the tape-recorded transcript of the Local Board hearing, the evidence submitted to the Commission during the appeal hearing (“ATC Hearing”), contents of the entire Commission file (“ATC File”), and the evidence submitted subsequent to the appeal hearing, now tenders her Proposed Findings of Fact and Conclusions of Law to the

Commission.

II. EVIDENCE BEFORE THE LOCAL BOARD

A. The following individuals testified before the Local Board in favor of the Applicant in this cause:

1. Mark Kesmodel.

B. The following evidence was introduced and admitted before the Local Board in favor of the Applicant in this cause:

None.

C. The following individuals testified before the Local Board against the Applicant in this cause:

1. Norman Pace; and
2. Mary Walker.

D. The following evidence was introduced and admitted before the Local Board against the Applicant:

1. A map showing various businesses that sell alcohol, including restaurants;
2. Petition to Remonstrate;
3. Copies of Indiana Code 7.1-6-3-5;
4. 2002 NAICS Definitions; and
5. Various city and county council resolutions.

III. EVIDENCE BEFORE THE COMMISSION

A. The following individuals testified before the Commission in favor of the Applicant in this cause:

1. Mark Kesmodel. Mr. Kesmodel testified that he is the area manager for the Applicant with responsibilities over Store #22. Mr. Kesmodel testified that Exhibit C reflected a list of 27 stores owned by Applicant that currently maintain alcoholic beverage permits in Indiana. Mr. Kesmodel further testified that in April of 2005, a 28th store, located in Allen County, Indiana, was awarded an alcoholic beverage permit. Mr. Kesmodel further testified that all 28 stores were

substantially the same size and sold substantially the same goods, and that all maintained a grocery permit. Mr. Kesmodel further testified that Store #22 was similar in size, if not somewhat larger, and sold grocery items similar to the other 28 stores maintaining a alcoholic beverage permit. Mr. Kesmodel testified that these stores, including Store #22, sold typical grocery items including milk, chips, snacks, bread, and other items typically sold by grocery stores. Mr. Kesmodel further testified that he did not believe that any aspect of Store #22 would make it any less likely to be a grocery store than the other 28 locations that maintain grocery permits in the State of Indiana.

Mr. Kesmodel next testified as to the security and training undertaken by the Applicant's chain of stores. Mr. Kesmodel stated that the following security and training mechanisms were in place at all 28 stores: (1) We Card Training; (2) cash register safeguards that require a cashier to enter the date of birth of any individual purchasing beer and/or wine; and (3) security cameras, which monitor and record the actions and transactions of customers and cashiers, and also record verbal conversations.

Mr. Kesmodel stated that the security camera recordings are reviewed daily by the Applicant's store management and security officers to ensure that all personnel adhere to the Applicant's training and procedural requirements. In addition, each store that maintains a liquor license requires its employees to undergo alcohol awareness management for further education. Finally, Mr. Kesmodel noted that as of the date of the ATC Hearing, none of the 28 locations with permits had been cited by the ATC for a single alcohol violation.

2. Kevin Ryan. Mr. Ryan testified that he is the Area Store Manager of Store #22 and that he personally surveyed residents living within approximately one to two miles of Store #22. Mr. Ryan testified that he did not provide any financial incentive or other favor to induce a survey participant into indicating that they were in favor of the permit or to deter them from indicating their disfavor. He testified that Exhibits D and E accurately reflected the results of the survey. The results of the survey indicated that 29 of 34 participating area residents were in favor of the alcoholic beverage permit for Store #22.

Mr. Ryan also testified that an in-store survey was used by placing a survey form near the cash register at Store #22. This survey remained at the cash register during normal business hours and no personnel encouraged or discouraged individuals from signing the survey. Again, no financial incentive or free product was used to entice a customer to vote. Mr. Ryan stated that no sheet was destroyed or modified by Applicant personnel. Mr. Ryan further testified that Exhibit "F" reflected all survey results, which reflected that 10 of 10 participants (100%) were in favor of Store #22 selling beer/wine.

Mr. Nader noted that in-store and residential surveys recently conducted by Applicant for other stores resulted in a similar positive vote in favor of granting the licenses. Mr. Nader requested the ATC to take administrative notice of the surveys that were filed for the Allen County Local Board Hearing and the West Lafayette, Indiana ATC Hearing (see Exhibit G).

3. Michael J. Nader, Baker & Daniels, LLP., attorney for Applicant. Mr. Nader noted that ATC records disclosed that, as of July 25, 2005, the ATC had

issued 97 grocery permits in Marion County and that 184 grocery permits were available for issuance in Marion County.

B. The following evidence was introduced and admitted before the Commission in favor of the Applicant in this cause:

1. Exhibit A – Newspaper Article, dated December 31, 2002;
2. Exhibit B – Article written by National Association of Convenience Stores;
3. Exhibit C – List of Type 116 Permits;
4. Exhibit D – List of permits in Indianapolis/Marion County;
5. Exhibit E – Survey by Circle K regarding Beer/Wine Permit;
6. Exhibit F – Survey by Circle K regarding Beer/Wine Permit;
7. Exhibit G – Survey by Circle K regarding Beer/Wine Permit;
8. Exhibit H – Article from “Common Ground” on the website of Marion County Alliance of Neighborhood Associations;
9. Exhibit I – Article regarding Hirons & Company Advertising Agency “Our Point of Difference . . .”;
10. Exhibit J – Article “Hirons & Company Win Pinnacle Award of Honor”;
11. Exhibit K – Petition from Remonstrators;
12. Exhibit L – Mapquest map of remonstrator’s residence;
13. Exhibit M – Copy of 905 IAC 1-36-8;
14. Exhibit N – Article from Common Ground “A Look Back at 2002”; and
15. Exhibit O – Letter from Eastgate Neighborhood Association from Sharon Tabard.

C. The following individuals testified before the Commission against the Applicant in this cause:

1. Norman Pace. Mr. Pace testified as to his active role in regard to the need and the nature of Store #22’s business. Mr. Pace did not believe Store #22 satisfied the definition of a grocery store. Mr. Pace introduced a letter from Warren Township Development Association that objected to the permit. Mr. Pace also referenced a letter from the Eastgate Neighborhood Association, which was admitted over objection at the Local Board hearing. By letter dated September 27, 2005, Mr. Pace produced a summary of the 2003 Warren Survey. The survey reflected a sentiment not to “pursue” gas stations.

2. Mary Walker. Ms. Walker stated that she is actively involved with the Marion County Alliance of Neighborhood Association. Ms. Walker introduced a copy of the North American Industry Classification System (“NAICS”), that defines “gasoline stations with convenient store,” and she asserted the definition excluded grocery stores. Mr. Nader objected on the basis that (1) the NAICS does not interpret or enforce the alcoholic beverage laws of Indiana and, therefore, it was irrelevant; and (2) that the ATC interprets the alcoholic beverage laws and has held a convenience store that sells gas may qualify as a grocery store. Mr. Nader requested the Hearing Judge take administrative notice of the beer/wine grocery permits issued by the ATC to Indiana convenience stores that also sell gasoline as proof of the latter point. The NAICS evidence was then admitted.

Ms. Walker also showed the Hearing Judge a number of automotive products that she stated were available at Store #22. She further stated, by analogy, that simply calling oneself a horse (or a grocery store), does not necessarily make it true. Ms. Walker did not believe that Store #22 satisfied the definition of a grocery store for purposes of the beer/wine permit.

D. The following evidence was introduced and admitted before the Commission against the Applicant in this cause:

1. Warren Township Development Association Letter;
2. NAICS Definition of Grocery Store;
3. Commerical Zoning Ordinance of Marion County, including definitions;
4. Various automotive items; and
5. Evidence submitted by Norman Pace subsequent to the hearing (Warrant summary of survey results and Marion County ordinance provisions).

IV. FINDINGS OF FACT

1. The Applicant, Mac’s Convenient Stores, LLC., d/b/a Circle K Store #22,

2080 North Shadeland Avenue, Indianapolis, Indiana 46219, permit number DL49-21244, is the applicant for a type 116 ATC permit. (ATC File).

2. The Applicant sells milk and other dairy products, soup, bread, eggs, cereal, soda, snacks and other items customarily found in a grocery store (Local Board Hearing; ATC Hearing).

3. As of July 25, 2005, there existed in Marion County, Indiana, a total of 184 available grocery permits.

4. The Commission has determined 28 other Mac's Convenience Stores, each of which is substantially similar to Store #22, to be "grocery stores" pursuant to Indiana law (ATC records; ATC Hearing; Exhibit C).

5. The Applicant has not had any alcohol violations in connection with any of its 28 existing licenses. (ATC Hearing and ATC records).

6. The Applicant's employees are extensively trained to avoid issues regarding the sale of alcoholic beverages to underage persons, receiving We Card Program and technical alcohol management training. (Local Board Hearing; ATC Hearing).

7. The Applicant employs a number of security devices to secure the premises and avoid the unauthorized sale of alcohol, including cameras, management review of security tapes, and cash registers that require a customer's age to be entered before alcohol may be purchased. (ATC Hearing).

8. Applicant's employment policies provide for termination of employment for a violation of any alcoholic beverage laws or procedures (ATC Hearing).

9. There are other businesses that sell alcoholic beverages in the vicinity of

Store #22. (ATC records; LB Remonstrator Exhibit).

10. Applicant has introduced evidence of area residents' desire or approval of its ability to sell beer/wine (Testimony of Kevin Ryan; Exhibits D, E and F).

11. The Department of Metropolitan Development for Marion County found Store #22 to be in compliance with local zoning ordinances for a convenience store that sells alcohol. (ATC records).

12. Any finding of fact may be considered a conclusion of law if the context so warrants.

V. CONCLUSIONS OF LAW

1. The Applicant, Mac's Convenient Stores, LLC., d/b/a Circle K Store #22, 2080 North Shadeland Avenue, Indianapolis, Indiana 46219 ("Applicant" or "Store #22"), is the applicant for a type 116 Alcohol and Tobacco Commission ("Commission" or "ATC") permit. (ATC records).

2. The Commission has jurisdiction over this matter pursuant to Indiana Code § 7.1-1-2-2 and § 7.1-2-3-9.

3. The permit application was properly submitted pursuant to Ind. Code § 7.1-3-1-4.

4. The Commission is authorized to act upon proper application. *Id.*

5. The Hearing Judge may take judicial notice of the Commission file relevant to a case, including the transcript of proceedings and exhibits before the local board. 905 IAC 1-36-7(a).

6. The Hearing Judge conducted a *de novo* review of the appeal on behalf of the Commission including a public hearing, and a review of the record and documents in

the Commission file. Ind. Code § 7.1-3-19-11(a); 905 IAC 1-36-7(a), -37-11(e)(2); *see also* Ind. Code § 4-21.5-3-27(d).

7. Evidence at the hearing was received in accordance with the Indiana Administrative Code and the Commission's rules. The findings here are based exclusively upon the substantial and reliable evidence in the record of proceedings and on matters officially noticed in the proceeding. 905 IAC 1-37-11(e)(2); Ind. Code § 4-21.5-3-27(d).

8. Applicant is a fit and proper applicant and is well qualified to hold an alcoholic beverage permit under Indiana law. 905 IAC 1-27-1.

9. Applicant is of good moral character and in good repute in the community in which it does business and is qualified to hold the permit it seeks. Ind. Code § 7.1-3-4-2(a)(2)(A).

10. Although the rules of evidence are relaxed in hearings before an administrative agency such as the ATC, it does not follow that no rules of evidence apply. *Oriental Health Spa v. Fort Wayne*, 526 N.E.2d 1019, 1022 (Ind. Ct. App. 1988). Remonstrator's testimony that the Applicant is not a grocery store within the meaning of Indiana law is a legal conclusion and is therefore inadmissible under Rule 704(b) of the Indiana Rules of Evidence.

11. In determining whether to issue a permit, the Commission may consider the geographic desirability of a proposed permit location, the need for the permit at the proposed location, the community's desire for the permit, and the impact of the permit on the community and other businesses. 905 IAC 1-27-4.

12. The Commission may consider both a need and desire for the permit in determining whether a permit should be issued in a particular matter. *Id.*

13. “Need” means whether the services are available at the location or in some close geographic proximity. 905 IAC 1-27-4(a).

14. “Desire” means whether individuals would purchase those products at that location, if they were available. 905 IAC 1-27-4(b).

15. A determination of whether there exists a need and desire for the services at the location in question turns on the facts of each case. *Id.*

16. Where an Applicant shows that customers would be willing to purchase alcoholic beverages if they were available for sale, such evidence constitutes a desire to receive such services at that location. 905 IAC 1-27-4(b).

17. Where an Applicant shows that competing stores located in close proximity to the proposed permit premises are selling alcohol, such evidence constitutes a desire to purchase the product. *Id.*

18. When Remonstrators cite to the deleterious impact to the community by sale of alcoholic beverages in opposing a permit, it goes to the impact of such services on the neighborhood or community. 905 IAC 1-27-4(d).

19. Where Remonstrators show that local residents and businesses are against issuance of alcoholic beverage permit at this particular location, such evidence constitutes a desire to not receive such services at that location. 905 IAC 1-27-4(b).

20. The Commission may issue an alcoholic beverage permit to the proprietor of an establishment when it appears to the satisfaction of the Commission that a

substantial portion of the business carried on in the premises is in the nature of the applicant's main business function in the premises. Ind. Code § 7.1-3-1-19.

21. The Commission may issue a beer and wine permit to an applicant when a substantial portion of the applicant's business in the premises is in the nature of a grocery store. Ind. Code § 7.1-3-5-2; Ind. Code § 7.1-3-1-19.

22. The phrase "in the nature of the applicant's main business function" as applied in Ind. Code § 7.1-3-1-19 to grocery stores means the retail sale of products typically found in an Indiana grocery store. *See Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 830 (Ind. App. 1982).

23. The term "grocery store," in common usage, means a building or structure in which groceries are kept for sale. *Goldstine v. State*, 103 N.E.2d 438-442 (Ind. App. 1952).

24. The word "substantial" as used in Ind. Code § 7.1-3-1.19 means something more than a nominal amount, something more than seeming or imaginary, but does not mean 50% or more. *Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 830 (Ind. App. 1982).

25. The phrase "in the premises" as used in Ind. Code § 7.1-3-1-19 means a building or part of a building in which alcoholic beverages are authorized to be kept or sold. Ind. Code § 7.1-1-3-20.

26. The Applicant has established that a substantial portion of its business in the premises is in the nature of a grocery store. (Local Board Hearing; ATC Hearing).

27. The Applicant has submitted substantial evidence that it, in fact, meets the character of business test for a grocery store and is qualified to hold an ATC permit.

(Local Board Hearing; ATC Hearing).

28. The Applicant is a “grocery store” under Indiana law and is therefore qualified to hold a type 116 grocery permit. Ind. Code § 7.1-3-5-2.

29. All laws shall be general and administered with uniform application throughout the State. Ind. Constitution, Art. IV, Sec. 23; *See also, Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 830 (Ind. App. 1982).

30. To deny the application to Store #22 while granting other similarly situated applicants’ applications would be arbitrary and capricious and otherwise not in accordance with the law. Ind. Code § 7.1-3-19-11.

31. The Local Board’s recommendation is clearly erroneous if there is a lack of substantial evidence which supports it. Ind. Code § 7.1-3-19-11.

32. The Commission may decline to follow the recommendation of the LB where the recommendation is not based on substantial evidence. *Id.*

33. The Local Board denied this application without sufficient evidence that would support a finding that this permit should not be issued. (Local Board Hearing).

34. The Commission may reverse the Local Board’s action in denying the application of a permit if it finds that the Local Board’s decision was: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (2) contrary to a constitutional right, power, privilege, or immunity; (3) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (4) without observance

of procedure required by law; or (5) unsupported by substantial evidence. Ind. Code § 7.1-3-19-11.

35. The Local Board's decision in denying the issuance of permit to the Applicant was (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (2) contrary to a constitutional right, power, privilege, or immunity; (3) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence. *Id.*

36. Any conclusion of law may be considered a finding of fact if the context so warrants.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the application of Mac's Convenient Stores, LLC., d/b/a Circle K Store #22, 2080 North Shadeland Avenue, Indianapolis, Indiana 46219, permit number DL49-21244, should be granted and the recommendation of the Local Board is reversed.

Dated: _____

U-Jung Choe
Hearing Judge